

Sound Refining, Inc. and Frank Milward, Petitioner¹ and Oil, Chemical and Atomic Workers International Union, Local 1-847. Case 19-RD-1792

30 September 1983

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 7 September 1982 the Regional Director for Region 19 of the National Labor Relations Board issued his Report and Recommendation on Objections to Election held on 27 July 1982.² Thereafter, the Petitioner filed exceptions and a supporting brief to the Regional Director's recommendation to overrule the Petitioner's objection and to certify the Union.

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the objection and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the Petitioner's exceptions and brief and has decided to affirm the Regional Director's findings and recommendations only to the extent consistent herewith.

The facts relied on by the Regional Director are very brief. The election herein was conducted over a period of two voting sessions. At both sessions, the Union's election observer, Russ Barber, had in his possession a copy of the *Excelsior* list³ furnished to him by the Employer. Barber kept this list inside a folder or notebook and, according to the Regional Director, "as employees appeared to vote, the Union observer opened the folder or notebook and made a notation next to the names of the voters." The Regional Director indicated that, during the course of the election, this activity was made known to the Board agent who, according to the Regional Director, was led to believe that the Union's observer was referring to a list of employees he intended to challenge.⁴

¹ The original Petitioner, Jack Balsley, withdrew prior to the counting of the ballots and designated Milward as the new Petitioner.

² The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 16 for, and 12 against, the Union; there were 3 challenged ballots, an insufficient number to affect the results.

³ See *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).

⁴ In its exceptions, the Petitioner elaborates on the Regional Director's comments. The Petitioner claims that, in the morning session, after he noted the Union's observer marking names, he waited until no voters were present in the polling area. He then protested to the Union's observer. In his protest, the Petitioner allegedly produced a copy of the "Instructions to Election Observers," which proscribes the keeping of "any list of those who have or have not voted." According to the Petitioner,

Without further elaboration, the Regional Director, as noted, concluded that the Board agent apparently was led to believe that Barber was referring to a list of employees that he intended to challenge and that the purpose of the listkeeping, in fact, was to ensure that proper challenges were made.⁵ Additionally, the Regional Director noted that, although election observers are prohibited from retaining lists of individuals who have or have not voted, the Petitioner was unable to present any evidence that any voter was aware that his name was being checked off by Barber. The Regional Director therefore concluded that any breach of the Board's election rules here was *de minimis* and did not constitute grounds for setting aside the election.

The Petitioner excepts to the Regional Director's conclusions. The Petitioner claims that Barber's list was not kept to ensure that proper challenges were made, but rather to allow the Union to contact those voters who had not yet voted, and, secondly, that Barber's violation of the Board's election rules was not *de minimis*.⁶

Contrary to the Regional Director, we find that Barber's listkeeping violated the Board's prohibition against the keeping of any list by election observers of employees who have or have not voted.⁷ We further find that this action was not *de minimis*. Moreover, we find that Petitioner's failure to present any direct evidence that any employee other than Petitioner witnessed Barber's listkeeping does not detract from our finding this to be a meritorious objection to the election.

The Board in *International Stamping Co.*, *supra*, stated that "[e]lection rules which are designed to guarantee free choice must be strictly enforced against material breaches in every case, or they may as well be abandoned." In *A. D. Juillard and Co.*, 110 NLRB 2197, 2199 (1954), the Board stated more explicitly that, if "it was either affirmatively shown or could be inferred from the circumstances, that the employees knew that their names

Barber responded loudly by stating that "he did not think that it mattered." Upon hearing this exchange, the Board agent allegedly sanctioned Barber's keeping of the list.

⁵ Had this been the purpose of the list, it would have been a permissible activity.

⁶ In further support of its position, the Petitioner relies on another portion of his affidavit to the Board which was not included in the Regional Director's report. In that section, the Petitioner asserted that, during the afternoon session, the president of the Union entered the polling area to vote, and then asked the Union's observer if all eligible employees had been contacted. The observer indicated that he did not know but thought that someone was taking care of that. The president then looked at the observer's list and the observer appeared to point out some names, and the president then left. There was no indication in the affidavit if the Board agent allegedly saw this incident and we find it unnecessary to rely on it in reversing the Regional Director.

⁷ See, e.g., *International Stamping Co.*, 97 NLRB 921 (1951).

were being recorded," the election should be set aside. Nevertheless, an exception to this prohibition has developed to cover those instances in which none of the voters or only a small number of them know that such a list is being kept. In those instances, the Board has determined that the violation of the listkeeping prohibition is *de minimis*.⁸ Applying the appropriate standard here leads us to set aside the instant election.

In this case, we find first that Barber's listkeeping was of a type generally proscribed by the Board. The Regional Director's own finding that Barber made a notation next to the name of each voter as he approached to vote belies any assertion that Barber's list was simply a list of voters whom the observer intended to challenge.⁹ Next, we find that, in all the circumstances, it can be inferred that the voters knew that Barber was recording their names.¹⁰ In this regard, we note Barber's conspicu-

ous presence at the polls as an election observer and the absence of any indication of an attempt by Barber to conceal his conduct.¹¹ This action was not *de minimis* because Barber continued to make his list in both sessions of the election.

Therefore, on the basis of the foregoing, we sustain the Petitioner's objection, set aside the election, and direct that a second election be conducted.

ORDER

It is hereby ordered that the election in this case conducted on 27 July 1982 be, and it hereby is, set aside.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

⁸ See, e.g., *Locust Industries*, 218 NLRB 717 at fn. 2 (1975) (no evidence that any employee knew his name was being checked off); *Tom Brown Drilling Co.*, 172 NLRB 1267 (1968).

⁹ In fact, there were only three challenged ballots in the election.

¹⁰ See, particularly, *Piggly-Wiggly #011 and #228*, 168 NLRB 792, 792-793 (1967).

¹¹ Cf. *Tom Brown Drilling Co.*, *supra* at 1267. Although the employer's observer in *Tom Brown* also kept his copy of the eligibility list inside a manilla folder, the presence of other mitigating factors renders that case inapposite. Thus, unlike the instant case, the employer observer in *Tom Brown* made check marks only beside the first few voters' names and terminated this conduct upon the Board agent's admonishment. Furthermore, the prohibitive conduct took place in the morning session only at one of three polling places.